No. 15-290

In the

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC., et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONSE IN PART SUPPORTING THE PETITION AND SEEKING CONSOLIDATION WITH *KENT RECYCLING* (14-493)

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QUESTION PRESENTED

Is a Jurisdictional Determination, that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act?

LIST OF ALL PARTIES

Petitioner is the United States Army Corps of Engineers.

Respondents are Hawkes Co., Inc.; LPF Properties, LLC; and Pierce Investment Company.

CORPORATE DISCLOSURE STATEMENT

Hawkes Co., Inc., LPF Properties, LLC, and Pierce Investment Company have no parent company and no publicly held company owns 10% or more of the corporation's stock.

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The opinion of the court of appeals (App. 1a-21a) is reported at 782 F.3d 994. The opinion of the district court (App. 22a-43a) is reported at 963 F. Supp. 2d 868.

JURISDICTION

The court of appeals entered judgment on April 10, 2015. The court of appeals denied the United States Army Corps of Engineers' (Corps) petition for rehearing on July 7, 2015 (App. 103a-104a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION

The Administrative Procedure Act "creates a presumption favoring judicial review of administrative action." *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367, 1373 (2012). That presumption applies in this case. Like the Sacketts, Hawkes is subject to agency strong-arming under the law. The facts show the wetlands on Hawkes' property are not jurisdictional under the Clean Water Act. But the Corps has erroneously determined otherwise through a final and legally binding Jurisdictional Determination (JD). Hawkes can take no action without incurring exorbitant expense and delay. Seeking a permit will cost hundreds of thousands of dollars and months or years in review. Proceeding with the project without a permit will subject Hawkes and its officers to both civil and criminal liability with potential fines of $37,500 per day and the risk of incarceration. Even taking no

action is prohibitive because it means an end to the proposed project and Hawkes' economic viability. Fairness requires, and the law demands, that Respondents be given "their day in court" to contest the Corps' illegal assumption of federal jurisdiction. Therefore, this Court should grant review of *Hawkes* to affirm the decision below.

ARGUMENT

I

THE COURT SHOULD GRANT REVIEW BECAUSE A THREE-WAY CIRCUIT SPLIT EXISTS ABOUT THE JUDICIAL REVIEWABILITY OF BINDING JURISDICTIONAL DETERMINATIONS

Respondents agree with the government that the Eighth Circuit decision in *Hawkes* created a conflict with the Fifth Circuit in *Kent Recycling Services, LLC* (a/k/a *Belle Company*) *v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014), now pending in this Court (14-493). The *Hawkes* decision also conflicts with the decision of the Ninth Circuit in *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008). This Court should, therefore, resolve the circuit split.

The Ninth and Fifth Circuits hold that a Jurisdictional Determination is conclusive as to federal jurisdiction, but not reviewable under the Administrative Procedure Act as final agency action. Those cases leave landowners with only three options: (1) abandon the proposed project, at great cost; (2) go through the pointless and costly permit process (averaging more than $270,000); or (3) proceed without a permit, risking immense fines of $37,500 a day and

imprisonment. *See* App. 14a-15a. These are not legitimate options. They are punitive sanctions imposed on landowners who challenge federal jurisdiction under the Clean Water Act. Accordingly, the Eighth Circuit properly held a Jurisdictional Determination was final agency action subject to judicial review because a Jurisdictional Determination is conclusive as to federal jurisdiction under *Sackett v. EPA*, 132 S. Ct. 1367 (2012), and that Hawkes had no other adequate remedy in law. The court explained:

> The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of [Hawkes] peat mining project, without having to test whether its expansive assertion of jurisdiction—rejected by one of their own commanding officers on administrative appeal—is consistent with the Supreme Court's limiting decision in *Rapanos*. For decades, the Corps has "deliberately left vague" the "definitions used to make jurisdictional determinations," leaving its District offices free to treat as waters of the United States "adjacent wetlands" that "are connected to the navigable water by flooding, on average, once every 100 years," or are simply "within 200 feet of a tributary." *Rapanos*, 547 U.S. at 727-28, 126 S. Ct. 2208, quoting a GAO report. The Court's decision in *Sackett* reflected concern that failing to permit

immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions. The Court concluded that was contrary to the APA's presumption of judicial review. "[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." 132 S. Ct. at 1374.

In our view, a properly pragmatic analysis of ripeness and final agency action principles compels the conclusion that an Approved JD is subject to immediate judicial review. The Corps's assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169, 117 S. Ct. 1154. Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with "the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune." "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). We

> conclude that an Approved JD is a final agency action and the issue is ripe for judicial review under the APA.

App. 15a-17a.

In her concurring opinion, Judge Kelly added this insight to the decision:

> In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. *This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This jurisdictional determination was precisely what the Court deemed reviewable in Sackett. See Sackett*, 132 S. Ct. at 1374-75 (Ginsburg, J., concurring). Accordingly, I concur in the judgment of the court.

App. 20a-21a (emphasis added).

The inter-circuit split occasioned by the *Hawkes* decision warrants review by this Court.

II

THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISIONS OF THE FIFTH AND NINTH CIRCUITS CONFLICT WITH THE DECISIONS OF THIS COURT

In addition to the conflict with this Court's unanimous decision in *Sackett*, on which the Eighth Circuit relied, the *Hawkes* court also documented a conflict between the decisions in *Fairbanks* and *Kent Recycling* with other decisions of this Court. In *Hawkes*, the court opined that the government grossly understated the impact of a Jurisdictional Determination by "exaggerating the distinction between an agency order that compels affirmative action," like the compliance order in *Sackett*, "and an order that prohibits a party from taking otherwise lawful action." According to the Eighth Circuit, "[n]umerous Supreme Court precedents confirm that this is not a basis on which to determine whether 'rights or obligations have been determined' or 'that legal consequences will flow' from agency action." *Id.* Specifically,

> —[i]n *Bennett*, the Court held that a Fish and Wildlife Service biological opinion satisfied the second factor because it required the Bureau of Reclamation to comply with its conditions and thereby had "direct and appreciable legal consequences." 520 U.S. at 158, 178, 117 S. Ct. 1154. Though not self-executing, the biological opinion was mandatory. Likewise, here, the Revised JD requires appellants either to incur substantial compliance costs (the permitting

process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties.

—In *Abbott Laboratories*, the Court held that prescription drug labeling regulations were a final agency action subject to pre-enforcement judicial review because they "purport to give an authoritative interpretation of a statutory provision" that puts drug companies in the dilemma of incurring massive compliance costs or risking criminal and civil penalties for distributing "misbranded" drugs. 387 U.S. at 152-53, 87 S. Ct. 1507

—In *Frozen Food Express v. United States*, 351 U.S. 40, 76 S. Ct. 569, 100 L. Ed. 910 (1956), plaintiff sought judicial review of an Interstate Commerce Commission order declaring that certain agricultural commodities were not exempt from regulations requiring carriers to obtain a permit to transport. *Id.* at 41-42, 76 S. Ct. 569. As in this case, the order "would have effect only if and when a particular action was brought against a particular carrier." *Abbott Labs.*, 387 U.S. at 150, 87 S. Ct. 1507 The Court nonetheless held the order reviewable because the "determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact"; it "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." *Frozen Food*

Express, 351 U.S. at 43-44, 76 S. Ct. 569. Here, the Revised JD is a determination regarding a specific property that has an even stronger coercive effect than the order deemed final in *Frozen Food Express*, which was not directed at any particular carrier. In *Port of Boston*, 400 U.S. at 70-71, 91 S. Ct. 203, the Court rejected as having "the hollow ring of another era" the contention that an "order lacked finality because it had no independent effect on anyone," citing *Frozen Food Express*.

—In *Columbia Broadcasting System v. United States*, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563 (1942), the Court held that FCC regulations barring the licensing of stations that enter into network contracts, though not self-executing, were subject to immediate review. "It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose application for licenses the regulations will cause to be rejected." *Id.* at 422, 62 S. Ct. 1194. Here, the Revised JD alters and adversely affects appellants' right to use their property in conducting a lawful business activity. The adverse effect is caused by agency action, not simply by the existence of the CWA. Though the Revised JD is not-self-executing, "the APA provides for judicial review of all final agency actions, not

> just those that impose a self-executing sanction." *Sackett*, 132 S. Ct. at 1373.

App. 11a-13a.

These conflicts also warrant resolution by this Court.

III

THE COURT SHOULD GRANT REVIEW IN BOTH *HAWKES* AND *KENT RECYCLING* AND CONSOLIDATE THE CASES FOR BRIEFING AND ORAL ARGUMENT

The government argues *Hawkes* is the better case to resolve the inter-circuit split than *Kent Recycling* (14-493, now pending) because *Kent Recycling* "may" have standing problems. But this is a red herring. Both of these cases are before this Court on 12(b) motions to dismiss wherein the assertions made in the complaint are taken as facts. The government does not contest that the complaint in *Kent Recycling* is sufficient to establish standing, which is based on Kent Recycling's possession of an option to purchase which is still valid. Any other change in circumstance can be determined on remand, without harm to the court or the parties, where the issue of standing can be properly established. And the Court should take notice that many outside organizations and individuals, including, but not limited to, the American Farm Bureau Federation, U.S. Senator David Vitter, and the Center for Constitutional Jurisprudence, all supported Kent Recycling's Petition.

After this Court denied the petition for certiorari in *Kent Recycling*, the Eighth Circuit issued the decision in *Hawkes* creating the circuit split. Kent Recycling filed a petition for rehearing and this Court ordered the Solicitor General to respond. This Court has yet to rule on the rehearing petition. It should do so now by granting the petition and consolidating the case with *Hawkes*.

Both cases raise the same question: Is a Jurisdictional Determination, that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act? The court in *Hawkes* expressly rejected the Fifth Circuit decision in *Kent Recycling*. Moreover, the cases raise virtually identical facts. In both cases the parties administratively appealed their respective Jurisdictional Determinations on grounds that the district engineer failed to properly apply the law and provided insufficient facts to support the Corps' claim of jurisdiction. In both cases, the reviewing officer agreed with the appellants that the JD's were deficient and were remanded with orders to correct the deficiencies. But, in both cases, the district engineer reissued the deficient Jurisdictional Determinations as final without correction:

> In October 2012, the Corps' Deputy Commanding General for Civil and Emergency Operations sustained [Hawkes'] appeal, concluding after detailed analysis that the administrative record "does not support [the District's] determination that the subject property contains jurisdictional wetlands and waters," and remanding to the

> District "for reconsideration in light of this decision." On December 31, 2012, the Corps nonetheless issued a Revised JD concluding, without additional information, that there is a significant nexus between the property and the Red River of the North, and advising appellants that the Revised JD was a "final Corps permit decision in accordance with 33 C.F.R. § 331.10," which meant their administrative remedies were exhausted. *See* 33 C.F.R. § 331.12.

App. 7a-8a.

In effect, in both cases, the Corps knowingly issued an invalid JD. It would be a travesty therefore if either of the parties in these cases were denied the right to challenge these illegal agency actions in court.

The only significant difference between the two cases is that Kent Recycling raised a due process claim based on the issuance of the admittedly invalid Jurisdictional Determination. The Fifth Circuit held the constitutional claim is subject to the same finality requirements under the APA as a statutory challenge. That decision created another circuit split with the D.C. Circuit as well as the Ninth and Eighth Circuits. *See* Kent Recycling Petition for Certiorari at 26-28. That issue is just as important as the issue presented in *Hawkes* and constitutes an independent basis for review by this Court.

In as much as *Hawkes* and *Kent Recycling* constitute both sides of a primary circuit split, there could be a no more appropriate pairing. Moreover, *Hawkes* and *Kent Recycling* are represented by the same counsel. That being said, *Kent Recycling* is the

only one to raise the due process issue. That makes *Kent Recycling* indispensable to resolving that conflict.

Therefore, the cases should be consolidated for briefing and oral argument.

CONCLUSION

According to the government, the Corps issues "tens of thousands" of Jurisdictional Determinations each year. Government Petition at 21. And, the question presented in *Hawkes* is likely to recur because "the Eighth Circuit's decision in this case will likely encourage other regulated parties to seek immediate judicial review." *Id.* at 22. Review should therefore be granted to affirm the Eighth Circuit decision.

DATED: October, 2015.

Respectfully submitted,

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REPLY BRIEF

No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
PETITIONER

v.

HAWKES CO., INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The court of appeals held in this case that a jurisdictional determination stating that particular property contains waters of the United States covered by the Clean Water Act, 33 U.S.C. 1251 *et seq.*, is reviewable "final agency action" under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* 5 U.S.C. 704. As the government explained in its petition for a writ of certiorari, that decision warrants review because it raises important questions about the proper timing of judicial review of the thousands of jurisdictional determinations that the United States Army Corps of Engineers (Corps) issues each year.

1. Respondents in this case agree (Br. 2) that certiorari should be granted. In particular, they agree (Br. 2-5) that the decision below conflicts with decisions of the Fifth and Ninth Circuits. See *Belle Co.* v. *United States Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014), cert. denied *sub nom. Kent Recycling*

Servs., LLC v. *United States Army Corps of Eng'rs*, 135 S. Ct. 1548 (2015), petition for reh'g pending, No. 14-493 (filed Apr. 16, 2015); *Fairbanks N. Star Borough* v. *U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008), cert. denied, 557 U.S. 919 (2009). Respondents also agree that the issue is important (Br. 11) and "likely to recur" (Br. 12).

2. Respondents defend (Br. 1-9) the court of appeals' decision on the merits, arguing that a jurisdictional determination is subject to immediate judicial review because it forces a landowner to choose among incurring compliance costs, "abandon[ing] the proposed project," or "risking immense fines." Br. 2. The government disagrees for the reasons stated in its petition for a writ of certiorari, see Pet. 13-21, but will reserve further discussion for its briefs on the merits, should this Court grant plenary review.

3. Respondents further contend (Br. 9-12) that the Court should also grant the petition for rehearing in *Kent Recycling Services, LLC* v. *United States Army Corps of Engineers* (No. 14-493), and consolidate the two cases. That course of action is unwarranted. Like this case, *Kent Recycling* presents the question whether a jurisdictional determination is final agency action. But granting review and consolidating the cases would complicate, rather than facilitate, the Court's consideration of that question.

Respondents do not contend that granting review in *Kent Recycling* would materially aid the Court in resolving the "final agency action" question that is common to both cases. That question is a purely legal one that does not turn on the circumstances of any particular case. While respondents emphasize (Br. 11) that *Kent Recycling* and this case "constitute both

sides of a primary circuit split," this Court can take into account the Fifth Circuit's reasoning in *Belle* without granting certiorari in that case. Respondents do not dispute, moreover, that this case provides a fully adequate vehicle to consider the "final agency action" question.

Respondents contend (Br. 11) that the Court should grant review in *Kent Recycling* to consider the additional question whether Kent Recycling's claim that the Corps violated its due-process rights is subject to the APA's "final agency action" requirement. See 14-493 Pet. i. As the government explained in its *Kent Recycling* brief in opposition (14-493 Br. in Opp. 25-27), the Fifth Circuit's rejection of petitioner's due-process claim is correct and does not squarely conflict with any decision of another court of appeals. The denial of certiorari in *Kent Recycling* reflects the Court's evident determination that the second question presented did not warrant further review. With respect to that question, Kent Recycling has not established that any "intervening circumstances of a substantial or controlling effect" have arisen, or that any "other substantial grounds not previously presented" warrant rehearing on that question.* Sup. Ct.

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* In an October 16, 2015 letter to the Court, Kent Recycling argued that a recent Ninth Circuit decision conflicts with the Fifth Circuit's holding that Kent Recycling's due-process claim was properly dismissed because it did not challenge final agency action. That contention lacks merit. In *ASSE International, Inc.* v. *Kerry*, No. 14-56402, 2015 WL 5904715, at *1, *7-*9 (Oct. 9, 2015), the Ninth Circuit held that the State Department's decision to impose certain sanctions against a program participant did not fall within the APA's exception to judicial review for decisions "committed to agency discretion by law." 5 U.S.C. 701(a)(2). The court stated in dicta that, even if the agency action in question had fallen

R. 44.2; see 14-493 Br. in Opp. to Pet. for Reh'g 4-5. Respondents likewise have provided (Br. 11) no justification for reconsidering the Court's denial of certiorari on the due-process issue.

The primary consequence of granting rehearing in *Kent Recycling* therefore would be to complicate the Court's consideration of the "final agency action" question by bringing before the Court the threshold justiciability issues present in *Kent Recycling*. As the government explained in its brief in opposition to the certiorari petition in *Kent Recycling*, the allegations in Kent Recycling's complaint do not establish that the terms of its alleged option to purchase the property at issue creates a concrete interest sufficient to support standing. 14-493 Br. in Opp. 8-12; see 14-493 Br. in Opp. to Pet. for Reh'g 5-8. It is also unclear whether the case continues to present a live controversy. 14-493 Br. in Opp. 11-12.

If this Court were to grant rehearing in *Kent Recycling* and consolidate the cases, the parties would brief and argue those justiciability issues, in addition to the "final agency action" question that is common to both cases, and the Court might ultimately conclude that *Kent Recycling* does not present a justiciable controversy. That conclusion would not prevent the Court from resolving the "final agency action" question in the context of *this* case. But because granting

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within Section 701(a)(2), "we would still be able to review [it] insofar as ASSE had raised colorable constitutional claims, unless Congress precluded such review." *ASSE Int'l*, 2015 WL 5904715, at *9 n.12. That statement does not address whether and how the APA's "final agency action" requirement applies to constitutional claims. The court had no occasion to consider that question, as it was undisputed that the State Department's decision constituted final agency action for APA purposes. *Id.* at *9.

the petition in *Kent Recycling* would not aid the Court in resolving that issue, considerations of judicial economy support granting review in this case alone.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant review in this case. The petition for rehearing in *Kent Recycling* (No. 14-493) should be held pending the resolution of this case, and then disposed of as appropriate in light of the Court's decision.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

NOVEMBER 2015